IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ASHLEIGH D., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and BRANDON H., Appellees.	2 CA-JV 2007-0032 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. JD200600216

Honorable Joseph R. Georgini, Judge

AFFIRMED

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By Anthony Giammarco
Chandler
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Dawn R. Williams
Tucson
Attorneys for Appellee Arizona
Department of Economic Security

B R A M M E R, Judge.

¶1 Appellant Ashleigh D., mother of Brandon H., appeals from the juvenile court's order of April 23, 2007, dismissing a dependency proceeding as to Brandon.

¶2 In mid-November 2006, Ashleigh gave birth to a daughter, Kailyn, who tested positive for exposure to methamphetamine at birth. Ashleigh submitted a hair follicle sample that likewise tested positive for methamphetamine in November. In December, the Arizona Department of Economic Security (ADES) filed a dependency petition alleging that Kailyn and her two half-brothers, Brandon H. and Nathan J., were dependent children by virtue of Ashleigh's substance abuse and neglect of the children.

¶3 Ashleigh was present with counsel at the preliminary protective hearing on December 27, 2006, and admitted the allegations of the dependency petition. The juvenile court adjudicated all three children dependent as to her and adjudicated Kailyn dependent as to her father, Buddy D., who was also present. Although ADES thus acquired legal custody of the children, Ashleigh retained physical custody of all three. The court scheduled an initial dependency hearing for February 7, 2007, for the fathers of Brandon and Nathan.

¶4 Juan M., a Texas resident, is the father of Brandon H. Based on information Ashleigh had supplied ADES, the dependency petition alleged Juan had abandoned Brandon and "d[id] not have an order granting him custody of Brandon." After being served in Texas with a copy of the dependency petition, however, Juan made a limited appearance through counsel and moved to dismiss the dependency petition as to Brandon and acquire custody of his son.

¶5 In his combined motions, Juan alleged he had "twice sought and obtained custody orders" in Texas—the first in May of 2004, which was then renewed in May

2005—granting him sole custody of Brandon and ordering Ashleigh to return Brandon immediately to Juan's physical custody. Despite diligent efforts to enforce those orders, Juan alleged, Ashleigh had refused to comply, had fled the jurisdiction with Brandon, and had continued to conceal her whereabouts. Juan's Arizona counsel filed with the juvenile court copies of the various Texas orders and other certified documents obtained from Juan's Texas attorneys.

¶6 At the initial dependency hearing for the fathers of Brandon and Nathan on the morning of February 7, 2007, Juan appeared in person with counsel; Ashleigh appeared only through counsel. Taking up Juan's motion to dismiss the proceeding as to Brandon, the juvenile court asked if there were any objections. Ashleigh's counsel responded, "No position, Your Honor," and no other party objected. There being no challenge to the legitimacy of the Texas orders awarding custody of Brandon to Juan and some reason to believe Ashleigh was a flight risk, the juvenile court ordered Child Protective Services (CPS) to take custody of all three children immediately and deliver Brandon to his father. After Brandon was in Juan's custody, the court stated, it would grant a motion to dismiss the dependency petition as to Brandon.[1] The record reflects no objection by Ashleigh's counsel to that proposed course of action.

¶7 The hearing adjourned mid-morning, and by noon the court had signed a written order authorizing ADES to take Brandon and his siblings into custody immediately.

[1]Were it to dismiss the dependency petition before Juan had custody of Brandon, the court noted, it would have no authority to direct the child's return to Juan.

Ashleigh did not subsequently appeal from the court's signed, appealable order of February 7 directing her to relinquish physical custody of Brandon and deliver him to a representative of ADES or a law enforcement officer. *See In re Yavapai County Juvenile Action No. J-8545*, 140 Ariz. 10, 14, 680 P.2d 146, 150 (1984) (aggrieved parent may appeal orders declaring child dependent, reaffirming finding of dependency, or determining custodial arrangement); *accord In re Maricopa County Juvenile Action No. JD-500116*, 160 Ariz. 538, 542, 774 P.2d 842, 846 (App. 1989) (order changing physical custody of child from Arizona foster home to relative placement out-of-state substantially affected parent's ability to have contact with child and was, therefore, a final, appealable order altering custodial arrangement); *but cf. In re Maricopa County Juvenile Action No. J-57445*, 143 Ariz. 88, 92, 691 P.2d 1116, 1120 (App. 1984) (order relocating dependent children from one foster home to another not final order appealable by previous foster parents). Because Ashleigh did not appeal from the juvenile court's order changing physical custody of Brandon from Ashleigh to Juan, we have no jurisdiction to consider any issues pertaining to that order.

¶8 At 4:20 p.m. on February 7, the juvenile court held a hearing on a motion, apparently submitted by facsimile by Juan's attorney, for an emergency telephonic hearing.[2] Juan's counsel appeared telephonically while two assistant attorneys general and counsel for the children were present in person. Ashleigh was neither present nor represented, and

[2]Although counsel for the children stated on the record that Juan's counsel had "filed a motion," no such written motion appears in the record.

the record is silent as to whether she or her counsel had been given notice of the hearing. During the hearing, counsel for ADES and Juan both reported to the court that "when CPS with a police escort went out to the home" where Ashleigh had been living with the children, no one was there, and "it appeared they had absconded."

¶9 Ashleigh complains on appeal that the juvenile court abused its discretion and violated her "fundamental due process rights" by proceeding in her absence with the afternoon "emergency hearing" without giving her notice or an opportunity to attend. ADES argues, in effect, that Ashleigh was voluntarily absent because she had chosen to abscond with the children earlier in the day. Contacted by telephone between the morning and afternoon hearings, Ashleigh and her mother reportedly told a CPS caseworker they and the children were more than two hours away from Florence. Juan's attorney told the court, "They took off knowing—not knowing the results of the [morning] hearing, but knowing the issues that were going to be raised at the hearing."

¶10 We agree that Ashleigh should have received notice of the emergency hearing and apparently did not, but we also note she was not prejudiced by what transpired in her absence. The transcript and minute entry from the afternoon hearing reflect the court made two orders: (1) "directing [ADES] to use all means of enforcement and to contact law enforcement to initiate an[] Amber Alert to get the children back," and (2) "affirming the Court's prior orders this morning."

¶11 Because the original order directing ADES to take the children into custody was entered at the morning hearing with Ashleigh's counsel present and because the

afternoon hearing concerned only the mechanics of implementing that order in light of Ashleigh's appearing to have absconded with the children, we cannot see that any prejudice accrued by virtue of her absence from the emergency afternoon hearing on February 7. And, again, she sought no timely recourse, either by appealing from the court's signed custody order or by seeking special action relief from any of the juvenile court's rulings.

¶12 Two weeks later, on February 21, Ashleigh was personally present in court with counsel for the hearing on Juan's motion to dismiss the dependency proceeding as to Brandon, who by then was in Juan's custody, and on Ashleigh's motion for the return of the other two children to her. The minute entry from that hearing reflects no objection by Ashleigh to the court's order dismissing Brandon from the dependency proceeding. Nor did Ashleigh include the transcript of that hearing in her designation of the record on appeal.

¶13 On February 26, Ashleigh was again present, and again did not object, when the juvenile court reaffirmed its earlier dismissal of the dependency proceeding as to Brandon. The court did so at the request of counsel for ADES at the conclusion of what had been scheduled as an initial dependency hearing as to the other two children's fathers and a domestic relations hearing on a "Petition for Emergency Custody" apparently filed by Ashleigh's parents. Neither the juvenile court's February 21 order dismissing Brandon from the dependency proceeding nor its February 26 order "affirming the dismissal" was reduced to a signed, written order.

¶14 More than seven weeks later, following a status review hearing on April 18 at which the court adjudicated Ashleigh's other two children dependent, the juvenile court

signed its minute entry from that date. The minute entry includes a final paragraph stating: "FURTHER ORDERED dismissing the Dependency Petition filed herein as to BRANDON H[.]" The order was signed and entered on April 23. It was followed fifteen days later by Ashleigh's notice of appeal, filed on May 8, 2007. *See* Ariz. R. P. Juv. Ct. 89(A), (B) (appellant must file notice of appeal within fifteen days after final, signed order filed with clerk; notice must "designate the final order or part thereof appealed from").

¶15 Thus, the only ruling from which Ashleigh has filed a timely appeal is the juvenile court's signed order of April 23, formally dismissing Brandon from the dependency proceeding. Neither the court's order of February 7 changing custody of Brandon from Ashleigh to Juan nor the other legal issues Ashleigh raises on appeal are encompassed by her notice of appeal or subject to our review. We note parenthetically the absence of any contemporaneous objection by Ashleigh to the juvenile court's actions on February 7 and her failure to raise below the issues she now seeks to raise on appeal. Consequently, Ashleigh had forfeited her right to appellate relief on those issues even before she failed to file a timely notice of appeal. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *Christy C. v. Ariz. Dep't of Econ. Sec.*, 214 Ariz. 445, ¶ 21, 153 P.3d 1074, 1081 (App. 2007).

¶16 Because ADES had filed the petition alleging Brandon was dependent, it was at liberty to seek to withdraw its petition—which, it argues, is effectively what it did. At the hearing on February 7, counsel for ADES stated:

> As to Mr. Juan M[.] at this time, we would indicate that the allegations [in the dependency petition] regarding abandonment

> and the fact there's no custody order in place are in fact not correct, and so therefore the child should be placed with—Brandon H[.] should be placed with Juan M[.] . . . .

Ashleigh's counsel interposed no objection. The court subsequently stated, "Upon presentation of a . . . formal order dismissing the dependency as to Brandon H[.], the Court will sign the order. There were no proposed orders contained in the motions that were filed, so present me with an order—proposed order, and I'll be happy to sign any orders consistent with today's rulings." Again Ashleigh's counsel was silent. And, when the court orally ordered the change in physical custody of Brandon to his father, Ashleigh's counsel likewise did not object.

¶17 Not only did Ashleigh thus tacitly acquiesce when the court stated its intention on February 7 to dismiss the dependency proceeding as to Brandon as soon as he was in Juan's physical custody, but the issues she has raised on appeal pertain not to the dismissal of the dependency petition but only to the court's earlier orders on February 7, from which she did not appeal. Accordingly, we affirm the juvenile court's order of April 23, 2007, dismissing the allegations of the dependency petition pertaining to Brandon H.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

PHILIP G. ESPINOSA, Judge